Filed 10/18/04 P. v. Swanson CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW BRIAN SWANSON, Defendant and Appellant.	H026109 (Santa Clara County Super. Ct. No. CC240699)

I. INTRODUCTION

An information filed in 2002 charged defendant, Matthew Brian Swanson with multiple counts of sexually abusing a minor beginning in 1995. The trial court found defendant guilty of 21 out of 22 counts charged. The court expressly found true the facts necessary to show that as to the first nine counts (counts 1 through 9) the statute of limitations had been tolled or extended by Penal Code section 803, subdivision (g) (hereafter, section 803 (g)).[1]

On appeal defendant argues that the statute of limitations had expired on counts 10 through 17, as it had on counts 1 through 9, but because the operative pleading did not contain facts to show that section 803 (g) applied to these counts, and the trial court did not make its factual findings expressly applicable to these counts, his conviction on counts 10

[1] Hereafter, all statutory references are to the Penal Code.

through 17 must be reversed. Defendant also argues that there was insufficient evidence to corroborate certain of the victim's allegations and that section 803 (g) violates the Ex Post Facto clause of the United States Constitution. (U.S. Const., art. I, § 10, cl. 1.)

Following the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*), the parties provided supplemental briefing on defendant's argument that he was denied his jury trial and due process rights when the trial court imposed consecutive prison terms based upon facts not found true by a jury beyond a reasonable doubt.

We reject the arguments and affirm.

II. FACTS

Defendant was a longtime friend and neighbor of Andy M. Andy was diagnosed with muscular dystrophy when he was a child and by the time he was a teenager he was confined to bed and required a great deal of personal care. Defendant, along with many of Andy's family members, took turns taking care of Andy. Andy's nephew, victim 1, began taking an interest in his uncle's care in early 1995, toward the end of victim 1's seventh grade year, when victim 1 was 12 years old. Defendant was 25 years old at that time, 13 years older than victim 1.

Victim 1 testified that one day soon after he had begun caring for Andy, he and defendant watched a pornographic movie while seated next to each other in Andy's room. Andy was present but he was on a ventilator and slept most of the time. While defendant and victim 1 watched the movie they each masturbated themselves. Then, on his own initiative, victim 1 masturbated defendant and defendant reciprocated. Similar conduct occurred two or three times before the end of victim 1's seventh grade year and continued into the summer. Defendant had wanted victim 1 to perform oral sex but victim 1 refused. The reciprocal masturbation almost always involved pornographic movies and often included the use of alcohol or marijuana. Defendant told victim 1 that defendant could get into a lot of trouble for what they were doing.

At the beginning of victim 1's eighth grade year, he and defendant began performing oral sex on each other as well as masturbating each other. Victim 1 explained that defendant had asked him repeatedly to have oral sex and that victim 1 finally gave in. The two had sexual contact about one to two times per month during victim 1's eighth grade year. The oral sex occurred on five or six occasions during the school year and three or four times during the following summer. During victim 1's first year in high school in 1996, he and defendant had weekly sexual encounters involving either mutual masturbation or oral sex. The same activity continued with gradually decreasing frequency until victim 1 graduated. There were only one or two instances that occurred after graduation. Victim 1 turned 18 on July 22, 2000, after he had graduated from high school.

After victim 1 graduated from high school he began an intimate relationship with another man and told defendant he no longer wanted to engage in sexual acts with him. In spite of this, defendant made at least two unwanted sexual advances toward victim 1, grabbing his buttocks and crotch. The last such incident occurred on February 14, 2002, when victim 1 was 19 years old. Victim 1 reported these incidents to the police on February 15, 2002. In the course of reporting defendant's most recent conduct, victim 1 also revealed their sexual history, going back to their first sexual contacts when victim 1 was 12 years old.

Victim 2 was victim 1's younger brother. He began caring for Andy around 1998, when victim 2 was about 14 years old. Victim 1 was then about 16 years old and had become less involved in Andy's care. At trial victim 2 denied that he had had any sexual contact with defendant and denied that defendant had ever masturbated in his presence. However, during the investigation that followed victim 1's report to the police, victim 2 described defendant as the type of uncle who let him "drink beer and watch pornos" on "numerous" occasions. He also said that defendant would masturbate in his presence while watching pornographic movies in Andy's room. He reported that beer drinking and

pornographic movie watching occurred about 15 times during the preceding year (February 2001–February 2002) when victim 2 was 16 to 17 years of age and that about two-thirds of the time defendant masturbated himself while watching the movies.

When the police interviewed defendant, he admitted having engaged in mutual masturbation with victim 1 beginning when victim 1 was about 14 or 15 years old. When asked how many times this conduct took place, defendant stated "I don't know if it was every Saturday night, or every Friday night, or, or once a month. I, just whenever I was asked to go over there by [victim 1]." Defendant explained that victim 1 "suggested it a lot." The interviewer asked him if it was more than once or less than a hundred and defendant responded, "More than, less than, I would say, thirty." Defendant explained that the conduct often took place at Andy's house, although some occurred at defendant's home. The conduct usually included alcohol and pornographic movies.

Defendant said that when victim 1 was about 15 and a half or 16 years old defendant stopped going to Andy's house regularly and only went there when Andy called him to come over. Defendant stopped his regular visits because Andy had a nurse, Joe, who began taking Andy and victim 1 on excursions. They would go to the movies or to San Francisco to "peep booth shows, and, and all that stuff." Defendant felt hurt and betrayed. He saw victim 1 very little during this time, only at family gatherings. He began coming around to Andy's again after the nurse left, about the time of victim 1's 18th birthday. Defendant confirmed that after high school, victim 1 began having intimate relationships with other men, which took him away from defendant. This caused defendant to miss victim 1. He said he loved victim 1. "I mean, not as in lovers, but as in . . . [¶] . . . [¶] Love the guy, okay?"

When asked if he ever had oral sex with victim 1 defendant responded, "Yeah, after he was 18." Defendant said victim 1 had initiated the oral sex. He explained that he and victim 1 engaged in mutual oral sex three or four times before victim 1 told him he did not want to do it anymore.

III. SECTION 803 (G)

Section 803 (g), which applies to certain sex crimes committed against minors, is an exception to the limitations periods contained in sections 800 and 801. Section 803 (g)(1) provides that "a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5." Section 803 (g)(2) provides that the subdivision applies only if the limitation period specified in section 800 or 801 has expired and the crime involved substantial sexual conduct (excluding self-masturbation) and there is independent, admissible evidence that clearly and convincingly corroborates the victim's allegation.

IV. PROCEDURAL HISTORY

The district attorney filed a complaint on February 28, 2002, 13 days after victim 1 made his first report to law enforcement, charging defendant with six counts relating to his conduct with both victims. An information filed on July 11, 2002, contained additional charges. A first amended information was filed on September 27, 2002 and a second amended information was filed on March 25, 2003. The second amended information became the operative pleading. It contained a total of 22 counts, the first 20 of which referred to victim 1. There were 11 counts of lewd acts with a child under 14 (§ 288, subd. (a), counts 1-11), four counts of lewd acts with a child aged 14 or 15 (§ 288, subd. (c)(1), counts 12-15), four counts of oral copulation with a minor (§ 288a, subd. (b)(1), counts 16-19), and one count of distributing harmful matter to a minor (§ 288.2, subd. (a), count 20). The last two counts of the information related to victim 2: misdemeanor child molestation (§ 647.6, subd. (a), count 21) and contributing to the delinquency of a minor (§ 272, subd. (a)(1), count 22). Since only counts 1 through 17 are at issue here, we shall confine the remainder of our discussion to those counts.

The first information, filed on July 11, 2002, alleged facts relating to the provisions of section 803 (g). In pertinent part, the allegation read: "It is further alleged that a

complaint containing the offense(s) charged in Count(s) *counts 1 to 19* was filed within one year of the date of a report . . . by [victim 1], alleging that he/she, while under the age of eighteen (18) years, was the victim of a crime described in Penal Code section(s) 288, and furthermore, that any applicable limitation period specified in Penal Code sections 800 and 801 has expired, and the crime(s) involved substantial sexual conduct . . . and there is independent evidence that clearly and convincingly corroborates the victim's allegation . . . ." (Italics added.) The first amended information modified some of the charges and changed the counts to which the section 803 (g) allegation referred from "counts 1 to 19" to "Counts 1 through 9." The section 803 (g) allegation in the second amended information also referred to counts 1 through 9.

The trial court found defendant guilty on all counts except count 20. The court also found true the facts alleged in the section 803 (g) allegation. The court recited the factual findings verbatim from the allegation contained in the second amended information, finding "that a complaint containing the offenses charged in counts 1 through 9 was filed within one year of the date of the report . . . ." The court sentenced defendant to a total of 15 years and eight months in state prison. This appeal followed.

V. ISSUES

1. Must defendant's conviction of counts 10 through 17 be reversed because the operative pleading did not make the section 803 (g) allegation applicable to those counts or because the trial court did expressly find that section 803 (g) applied to these counts?

2. Is there sufficient evidence to corroborate certain of victim 1's allegations?

3. Is section 803 (g) constitutional as applied?

VI. DISCUSSION

A. Counts 10 Through 17

Defendant claims that his conviction of counts 10 through 17 must be vacated either because the section 803 (g) allegation in the amended pleadings referred only to counts 1

though 9, or because the trial court failed to make an express finding of the facts necessary for section 803 (g) to apply. Neither point has merit.[2]

When the charging document demonstrates on its face that the statute of limitations has run, the pleading must allege further facts to show why the action is not time barred. (*In re Demillo* (1975) 14 Cal.3d 598, 601 (*Demillo*).) The People have the burden of proof to show that the offense was committed within the required time or that an exception is applicable. Failure to do so requires the judgment be vacated. (*Ibid.*) When a statute of limitations defense is based upon a facially deficient pleading and is raised for the first time on appeal (as it is here), *People v. Williams* (1999) 21 Cal.4th 335, 341 directs us to review the record to determine whether the action was or was not time barred. If necessary, we are to remand the case to the trial court for factual findings on the question. (*Ibid.*)

Counts 1 through 17 as set forth in the second amended information are shown in the following table. The applicable limitations period for each is noted in the right hand column.

Count	Charge	Date Range	Limitations Period
1-9	§ 288, subd. (a) (child under 14)	1/1/95-5/31/96	6 years (§ 800)
10-11	§ 288, subd. (a) (child under 14)	6/30/96-7/21/96	6 years (§ 800)
12-15	§ 288, subd. (c)(1) (child 14 or 15)	7/22/96-7/21/98	3 years (§ 801)
16-17	§ 288a, subd. (b)(1) (oral copulation)	7/22/98-7/21/99	3 years (§ 801)

Assuming that prosecution commenced no later than July 11, 2002,[3] one can see from the face of the pleading that the applicable limitations period had expired on counts 1

[2] Defendant actually directs the first argument to counts 10, 11, 14 through 17 and the second to counts 12 and 13. Since defendant's arguments either apply or do not apply equally to all the counts, our discussion applies to all of them.

[3] Prosecution is commenced for purposes of section 803 (g) with the filing of the complaint rather than with filing of the information as section 804 typically requires. (continued)

through 9 and counts 12 through 15. As to counts 10, 11, 16, and 17, the period had expired unless the crime alleged in each count had taken place during the last 10 days of the specified date range. Thus, the pleading does not show that the offenses were necessarily committed within the required time. Citing *Demillo*, *supra*, 14 Cal.3d at page 601 defendant claims that since the pleading applies the section 803 (g) exception to counts 1 through 9 only, counts 10 through 17 were time barred and the court had no jurisdiction to convict him on those counts. Although there is language in *Demillo* referring to the adequacy of the accusatory pleading, the court analyzed the facts, not the pleadings, to determine whether the action was timely or not. (*Demillo*, *supra*, 14 Cal.3d at p. 602.)

In our view, the issue here is simply one of a variance between the pleadings and proof. An immaterial variance between the pleadings and the proof should be disregarded. (*People v. LaMarr* (1942) 20 Cal.2d 705, 711.) The test for materiality of a variance is whether the information fully and correctly informs the defendant of the criminal act with which he is charged so that he or she is not misled in preparing a defense. (*Ibid.*) There is no question that defendant was sufficiently apprised of the prosecution's reliance upon section 803 (g) in this case. The allegation in the original information expressly applied to the first 19 counts. There is no explanation in the record, nor any that we can think of, for removing the allegation from the latter counts. As the Attorney General argues, the change could have been a typographic error, changing the "19" to a "9." Or it could have been a simple mistake in arithmetic. In any event, *People v. Williams*, *supra*, 21 Cal.4th at page 341 makes it clear that in cases such as this one, we must look beyond the face of the pleadings.

(See *People v. Yovanov* (1999) 69 Cal.App.4th 392.) The parties presume, however, that since all counts ultimately charged were first contained in the information, prosecution of at least some of the charges did not begin until that pleading was filed. The result in this case is not affected by the difference between the two dates.

The undisputed evidence is dispositive. Section 803 (g) applies by its terms to all the crimes in counts 10 through 17 for which the statute of limitations could have expired. Defendant does not dispute that prosecution commenced within a year of victim 1's February 15, 2002 report to law enforcement or that the crimes involved substantial sexual activity. And as we explain in more detail below, the victim's allegations were clearly and convincingly corroborated by independent, admissible evidence.

Defendant's contention that his convictions must be reversed because the trial court failed to make the necessary findings of fact is likewise unavailing. The court's express findings merely repeated the error contained in the pleading. And by finding defendant guilty of counts 10 through 17, the court impliedly found the section 803 (g) allegation to be true as to those counts as well as to counts 1 through 9.

In sum, the omission of the section 803 (g) allegations from some of the counts in the operative pleading and the court's failure to make express findings as to those counts, does not affect defendant's substantive rights and does not warrant reversal. (§ 960; and see *People v. Lamb* (1999) 76 Cal.App.4th 664, 676.)

B. S*ufficiency of the Corroborating Evidence*

As we explained, in order for section 803 (g) to apply, the crime alleged must have involved "substantial sexual conduct," and the victim's report of the crime must be "clearly" and "convincingly" corroborated by independent admissible evidence. (§ 803 (g)(2)(B).) Defendant challenges the second of these requirements.

1. Counts 1 through 11

Defendant argues that evidence of his admission and victim 2's statement is insufficient to clearly and convincingly corroborate victim 1's allegation, contained in counts 1 through 11, that defendant had molested him beginning when he was 12 years of age. Defendant argues that since victim 2 did not say that defendant had molested him, the evidence does not corroborate victim 1's allegations of molestation. Defendant further argues that even though he admitted molesting victim 1, since he estimated that the

molestation began when victim 1 was 14 or 15 years old, his admission does not corroborate victim 1's allegation that the molestation began when he was 12.[4]

Defendant's argument incorrectly presumes that in order for evidence to corroborate an allegation the evidence must duplicate or mirror the allegation. That is incorrect. Quoting an early version of Black's Law Dictionary one appellate court explained: " 'To corroborate is to strengthen, to confirm by additional security, to add strength.' " (*People v. Gonzales* (1990) 218 Cal.App.3d 403, 414.) The cases dealing with section 803 (g) reflect this understanding of the nature of corroborating evidence. In *People v. Yovanov*, *supra*, 69 Cal.App.4th at page 404 the appellate court held that evidence of uncharged sexual misconduct could be used to corroborate a victim's allegation of sexual abuse under section 803 (g). The appellate court stated: "Of course, the precise probative value to be accorded this evidence will depend on various considerations, such as the frequency of the uncharged acts and their similarity and temporal proximity to the charged acts." In *People v. Mabini* (2001) 92 Cal.App.4th 654, 658 the defendant argued that evidence of his other sexual offenses could provide the required corroboration only if the evidence showed that he committed the uncharged offenses against the same victim. Citing Evidence Code section 210, the appellate court reasoned that because evidence of similar offenses against an uncharged victim has a tendency in reason to prove a disputed fact of consequence to the determination of the section 803 (g) issue, "such evidence, if credited by the trier of fact, may standing alone constitute independent evidence that clearly and convincingly corroborates the victim's allegation." (*People v. Mabini*, *supra*, 92 Cal.App.4th at p. 659.)

[4] Defendant argues that the prosecution was limited to proving corroboration with the evidence it listed in the pleading, which is why he limits his discussion to the evidence of his admission and victim 2's claim, since that was the evidence the prosecution listed in the pleading. Since we conclude that the listed evidence is sufficient, we need not reach the related issue.

Obviously, the more similar the evidence is to the fact in issue the more weight it carries as corroboration, but it need not exactly match the evidence that requires corroboration.

Returning to the present case, we review the record in the light most favorable to the judgment to determine whether the evidence is sufficient to allow a reasonable trier of fact to find victim 1's allegation was clearly and convincingly corroborated by independent evidence. (*People v. Mabini*, *supra*, 92 Cal.App.4th at p. 659.) We conclude that it is.

Defendant admitted that he and victim 1 engaged in reciprocal masturbation. He confirmed that the conduct took place mostly in Andy's room while they were watching pornographic videos and drinking alcohol. The timeframe he described was similar to that victim 1 recalled--frequent encounters during the first year or two when victim 1 was in high school that became less frequent as time went on. The only difference between defendant's description of the events and that of victim 1 is defendant's estimate that the conduct began when victim 1 was about 14 years old and victim 1's recollection that it began when he was 12.

The corroborating evidence here is similar to that in *People v. Garcia* (2001) 89 Cal.App.4th 1321, which involved the corroboration required by section 262 in cases of spousal rape. In *Garcia* the defendant admitted that he engaged in sexual intercourse with the victim when and where the victim had described the rape occurring. The only difference was that the defendant described the act as consensual. This court concluded that although the defendant denied the criminal aspect of the victim's version, he corroborated the sexual intercourse part of her allegation and, therefore, met the corroboration requirements of section 262. (*People v. Garcia*, *supra*, 89 Cal.App.4th at p. 1334.) In other words, although the defendant's admission did not duplicate the victim's allegations, it confirmed some of the facts she had alleged, which tended to strengthen the credibility of her story. Here, defendant admitted the conduct and described the circumstances; it was just his estimate of when the conduct began that differed from victim 1's account.

Referring to counts 1 through 11, the trial judge explained that he found victim 1 to have been entirely credible and that he simply did not believe defendant's statement that the conduct did not begin until after victim 1 was 14 years old. Defendant argues that this statement shows that the trial court relied only on the victim's allegation, which is legally insufficient. To the contrary, the trial judge relied on defendant's admissions. The court stated: "[T]he one aspect of this case that I think corroborates what [victim 1] told me, [defendant], is very simply your statement to the police, because what your statement to the police corroborates is that these very, very serious charges that this relationship between [victim 1] and yourself and that these acts actually happened." The court went on: "Your admission is you came up with a number of 30 or less than 30. So I'm assuming from your own admission on that tape that I saw, that these things happened over and over and over again. [¶] But you now want me to believe that even being willing to do those things with and to [victim 1], that the argument is, 'But Judge, I didn't do it when he said I did. And I didn't do it as many times as he said I did it.' And your admission simply undermines your credibility in that respect. It simply does. I cannot take your word for this." In other words, the trial court's conclusion was that defendant's admission tended to confirm that victim 1 was telling the truth.

Victim 2's report to law enforcement further corroborates victim 1's allegations. Victim 2 confirmed that it was customary for defendant to watch pornographic movies in Andy's room and to do so in the presence of the younger boy, just as he did when victim 1 had been taking care of Andy. Victim 2 explained that it was not unusual for defendant to tolerate if not condone his use of alcohol and that the drinking and pornographic movie watching occurred quite regularly, at least once a month. He also said that on about two out of every three occasions, defendant masturbated himself in victim 2's presence, which is the very conduct that precipitated defendant's molestation of victim 1.

We conclude that defendant's admission, coupled with victim 2's allegations, was sufficient for the trier of fact to find that victim 1's allegation (that defendant had molested

him beginning when victim 1 was 12 years of age) was clearly and convincingly corroborated.

2. Counts 16 and 17

We also reject defendant's argument, raised for the first time in his reply brief, that the evidence was insufficient to corroborate victim 1's allegation of oral copulation before the age of 18 contained in counts 16 and 17. Defendant's admission showed that the great majority of the sexual conduct with victim 1 occurred while victim 1 was in high school. Indeed, defendant claimed it occurred mostly before victim 1 was 15 and one half years old. The admission is sufficient evidence upon which to base a finding that victim 1's allegation (that oral copulation occurred when he was a minor) was clearly and convincingly corroborated.

C. Section 803 (g) Is Not Unconstitutional as Applied to Defendant

Defendant contends that *Stogner v. California* (2003) 539 U.S. 607 (*Stogner*) compels the reversal of his conviction on counts 1 through 9 because their revival by section 803 (g) violates the ex post facto clause of the United States Constitution. (U.S. Const., art. I, § 10, cl. 1.)[5] We disagree.

Stogner held that section 803 (g) violated the ban against ex post facto laws where the statute of limitations had expired before the subdivision was enacted. (*Stogner*, *supra*, 539 U.S. at pp. 632-633.) By reviving the statute of limitations on crimes for which the statute had already expired, section 803 (g) made some people subject to punishment for prior acts at a time when they would not have been subject to any punishment at all. The court wrote: "[E]xtending a limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.' [Citation.] In such a case, the government has refused 'to play by its own rules,' [citation]. It has

[5] Although defendant has directed his argument to counts 1 through 9 only, our analysis is equally applicable to counts 10 through 17.

deprived the defendant of the 'fair warning,' [citation] that might have led him to preserve exculpatory evidence. [Citation.] And a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both 'arbitrary and potentially vindictive legislation,' and erosion of the separation of powers, [citation]." (*Stogner*, *supra*, 539 U.S. at p. 611.) The court concluded "that a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." (*Id*. at pp. 632-633.)

Defendant argues that by its terms section 803 (g) requires the limitations period to have expired and, therefore, it unconstitutionally revives a cause of action that could not otherwise have been prosecuted. A similar argument was rejected by *People v. Renderos* (2003) 114 Cal.App.4th 961, 966 in which the appellate court held that where the statute of limitations had not yet expired as of the date section 803 (g) was enacted, the law may be read as "extending" the statute of limitations, not reviving it. We agree with *Renderos*.

Stogner distinguished between statutes that extend the statute of limitations, and those that attempt to revive them. "Even where courts have upheld extensions of *unexpired* statutes of limitations (extensions that our holding today does not affect . . . .), they have consistently distinguished situations where limitations periods have *expired.*" (*Stogner*, *supra*, 539 U.S. at p. 618.) In the present case, defendant was charged with crimes committed as far back as January 1, 1995. Section 803 (g) became effective on January 1, 1994 (Stats. 1993-94, 1st Ex. Sess., ch. 46, § 2; § 803, subd. (g)(3)(A)), a full year before defendant is alleged to have committed the first of the crimes charged. Defendant's risk of prosecution for the crimes was never unfairly revived because the enactment of section 803 (g) before he committed the crimes put him on notice that he was subject to prosecution within a year of when his victims reported the molestation. In this case, unlike *Stogner*'s, section 803 (g) operates only as an extension of the statute of limitations for the crimes charged and is constitutional as applied to defendant.

D. Imposition of Consecutive Sentences Was Constitutional

Defendant waived his right to a jury and the trial court found him guilty of 21 counts. The court sentenced defendant by designating count 1 as the principal count and imposing the mitigated term of three years. The court then imposed two years each for counts 2 through 7 (one-third the mid term) and another eight months for count 12 (again, one-third the mid term). These terms were to run consecutively. The court imposed the mitigated term for the remainder of the felonies and ordered them to run concurrently. The total aggregated term imposed was 15 years and eight months. Defendant received credit for time served on counts 21 and 22, both misdemeanors. The trial court's stated reason for imposing consecutive sentences was: "[T]he Court recognizes each count reflects the same crime with the same victim on separate events, and a violation of trust."

Defendant now contends that under the principles enunciated in *Blakely*, *supra*, __ U.S. __ [124 S.Ct. 2531], the trial court violated his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to due process by imposing consecutive terms based upon factors he had not admitted and that were not found true by a jury beyond a reasonable doubt. The Attorney General argues that defendant waived his right to a jury trial so that his only claim of error relates to the standard of proof, that he forfeited any error by failing to object, that *Blakely* does not apply to consecutive sentencing, and that even if *Blakely* applies the error was harmless. Assuming that under the circumstances defendant did not forfeit his claim of error, we conclude that *Blakely* does not apply to the court's decision directing the terms for counts 2 through 7 and count 12 to run consecutively.

Blakely was preceded by *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) where the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) *Apprendi* was not concerned with the imposition of consecutive sentences but with

whether a 12-year sentence imposed for possessing a firearm was permissible when the maximum sentence for the offense as charged was 10 years. (*Id*. at p. 471.) The additional time was based upon the trial judge's finding by a preponderance of the evidence that the offense was racially motivated, which permitted application of a hate crime enhancement. (*Ibid.*) As our Supreme Court explained, "*Apprendi* treated the crime together with its sentence enhancement as the 'functional equivalent' of a single 'greater' crime. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

In *Blakely*, the defendant had pled guilty to kidnapping, which carried a standard sentence range of up to 53 months in prison. (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2535].) The trial court sentenced the defendant to 90 months based upon the court's finding that he had acted with "deliberate cruelty." The exceptional sentence was permitted by another statute that applied in domestic violence cases. (*Ibid.*) The state argued that there was no *Apprendi* error because the statutory maximum for Class B felonies (such as kidnapping) was 10 years. The threshold issue was what was the statutory maximum penalty for *Apprendi* purposes. *Blakely* held that the 10 year maximum was not the relevant range because the trial court had no discretion to impose any sentence greater than 53 months without taking into account " 'factors other than those which are used in computing the standard range sentence for the offense.' " (*Ibid.*) *Blakely* concluded, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]" (*Id.* at p. 2537.)

Defendant contends that *Blakely*'s reasoning applies to discretionary consecutive sentencing[6] because "[i]n California, the sentences on two or more felonies must run concurrently based on the jury verdict alone." Defendant's assertion relies on the last

[6] The California Supreme Court has agreed to consider the question in *People v. Black* (June 1, 2004, F042592) [nonpub. opn.], review granted July 28, 2004, S126182.

sentence in section 669, which states: "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."[7] This language does not create a presumption favoring concurrent terms nor does it establish a "statutory maximum" term for multiple felony convictions. Indeed, there is no presumption favoring concurrent over consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Rather, the language of section 669 provides direction in those rare instances where a court fails to direct the manner in which multiple terms are to be served.

Furthermore, the constitutional concerns expressed in *Blakely* are not applicable to consecutive sentencing. The evil targeted by both *Blakely* and *Apprendi* is that permitting a judge to determine facts that subject the defendant to punishment beyond the maximum sentence for the offense of conviction is like punishing the defendant for a more serious category of crime without having a jury find him or her guilty of the elements of the more serious offense. "[T]his constitutional principle does not extend to whether the sentences for charges which have been found to be true beyond a reasonable doubt shall be served consecutively." (*People v. Sykes* (2004) 120 Cal.App.4th 1331, 1345.) Nothing in the Penal Code deprives a court of discretion to choose consecutive sentencing absent factual findings beyond those underlying the verdict. Indeed, consecutive sentences may be imposed based solely upon the facts underlying the guilty verdict. (Cal. Rules of Court, rule 4.425.) To the extent a sentencing judge bases a sentencing decision on facts not found true by the jury, such as here where the court mentioned defendant's breach of trust,

[7] Section 669 reads in pertinent part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. . . ."

Blakely does not preclude this type of fact finding. Indeed, *Blakely* acknowledged that the Sixth Amendment was not implicated by judicial fact finding in connection with the exercise of sentencing discretion where the facts did not pertain to the defendant's legal right to a lesser sentence. (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2540].) In applying discretionary consecutive sentencing under section 669, the jury (or the court as in this case) has already found, beyond a reasonable doubt, the facts necessary to sentence the defendant for the crimes with which he was charged. "[T]he consecutive sentencing decision does not involve the facts, in Justice Stevens' words, 'necessary to constitute a statutory offense.' [Citation.]" (*People v. Sykes, supra,* 120 Cal.App.4th at p. 1345.)

We conclude that the trial court's selection of consecutive sentencing did not offend defendant's rights under the Sixth or Fourteenth Amendments.

VII. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

People v. Swanson
H026109